In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1003

LIVINGSTON ANTI-MERGER COMMITTEE, APPELLANT

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, ET AL., APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO AFFIRM OR DISMISS

Pursuant to Rule 16(1)(c) of the Rules of this Court, the Interstate Commerce Commission moves that the judgment of the district court be affirmed, or, in the alternative, that the appeal be dismissed.

STATEMENT

This is an appeal by the Livingston Anti-Merger Committee (of Livingston, Montana) from the unanimous judgment of a three-judge District Court sustaining the orders of the Commission in the "Northern Lines" rail merger case. The proceedings are fully described in the Commission's Motion to Affirm filed

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in Nos. 899, 942, and 999, this Term, involving the same judgment.

Livingston, a community of some 8,000 people, is served by NP and no other road (Ex. 15, p. 48). The City participated in the Commission hearings in 1962, when it appeared that the merger would cause substantial unemployment—long before agreement was reached as to job security for all employees. Accordingly, much of the testimony of its witnesses dealt with concern as to job losses and resulting economic impact.

The Committee also contended that the Northern Pacific Railway Co. lacked legal authority to merge because of defects in an 1896 foreclosure sale where it apparently acquired title to land grant lands (constituting the right of way) formerly held by a predecessor corporation. In his recommended report, the examiner reviewed this and other Livingston arguments, concluding that they were without merit. (Examiner's Report, pp. 361–366; Livingston J.S. 34–41). In its first report, the Commission stated that Northern Pacific Railway had acquired "rights" to the lands by virtue of an 1896 foreclosure (J.S. App. 70).* In subsequent reports approving the merger, the Commission, though discussing other Livingston issues (J.S. App. 467–469), made no further finding as to the validity of the 1896 foreclosure.

ARGUMENT

1. The Livingston Committee presents no issue warranting plenary review. As the lower court observed

*"J.S. App." refers to the Appendix filed in No. 899, this Term.

(J.S. App. 56), the effect of the foreclosure sale has been recognized by this Court, albeit in other contexts, (*Northern Pacific Ry. Co.* v. *Boyd,* 228 U.S. 482, 506 (1912); *United States* v. *Northern Pacific Ry. Co.,* 311 U.S. 317, 328 (1940)), and in two opinions of the Attorney General (21 Op. Atty. Gen. 486 (1897); 25 Op. Atty. Gen. 401 (1905)). Moreover, the very arguments now presented by the Committee have previously been rejected on the grounds of laches. *Landell* v. *Northern Pacific Ry.,* 122 F. Supp. 253 (D. D.C. 1954), affirmed, 223 F. 2d 316 (C.A. D.C.), cert. denied 350 U.S. 844. The Northern Pacific Railway has operated these properties, dealt with the public, and held itself out as a railroad for over 60 years. In addition, the Commission is not the proper forum to test the question, nor need the Commission delay proceedings pending such determinations.[1] Moreover nothing in Section 5 requires that merging roads hold "title" to all properties involved. A merger applicant may operate another road under lease;[2] it may operate freight cars acquired through equipment trust, conditional purchase, or other security devices;[3] it may lease freight cars from other roads or from car-building companies. Yet it cannot seriously be urged that such critical assets are exempted from

[1] *Cf. O.C. Wiley & Sons* v. *United States,* 85 F. Supp. 542, 543-545 (W.D. Va.), aff'd *per curiam,* 338 U.S. 902 (1944); *Watson Bros. Transp. Co.* v. *United States,* 143 F. 2d. 340, 346 (C.A. 8, 1944).

[2] *Seaboard Air Line R. Co.—Merger—Atlantic Coast Line,* 320 I.C.C. 122, 141 (1963); *Norfolk & W. Ry. Co. and New York C. & St. L. R. Co. Merger,* 324 I.C.C. 1, 64 (1964).

[3] *Chicago, B. & Q. R. Co.* v. *New York, S. & Western R. Co.,* 332 I.C.C. 176, 200 (1968).

merger for lack of "title" in the "owning" road. In these circumstances, the lower court properly rejected the effort of the Committee "* * * to raise for decision within the merger case a title case of great magnitude" (J.S. App. 55).[4]

The argument also lacks merit insofar as it rests upon the assumption that a railroad chartered by Congress cannot merge without some new grant of Congressional authority. The sweeping plenary authority granted to the Commission under Section 5(11) of the Act may well be regarded as sufficient Congressional authorization, if such be needed.

2. In any event, this Committee lacks standing to challenge the merger on the ground of the alleged defects in title. This group of Montana citizens possess no independent definite legal interest sufficient to contest alleged non-compliance with statutes securing, for the benefit of the United States, the use of a railroad, at appropriate times, for postal, military, and other governmental purposes. Cf. *Kerfoot* v. *Farmers' & Merchants' Bank,* 218 U.S. 281, 286–287 (1910); *Union*

[4] The Committee's procedural arguments lack merit. The testimony and document offered by the attorney, as to the "title" theory, were properly regarded as more suitable for briefing than for evidentiary hearings. (Tr. 14065, 14067). Even the Department of Justice, though differing with the examiner on the point, admitted that "much" of the material "involves legal arguments" (Justice Brief, January 4, 1963, p. 181). In any event, the City was not injured by the ruling. As noted by the Commission in a separate report rejecting allegations of bias as to the examiner, the Committee ultimately submitted on brief "substantially all of the data tendered" (328 I.C.C. at 208). Regardless of form, the essence of the Committee's contentions were before the examiner, and were ruled upon by him.

National Bank v. *Matthews,* 98 U.S. 621, 629 (1879). Significantly the United States, beneficiary of the Congressional enactments relied upon by the Committee, does not itself press the issue. In these circumstances, it would be particularly inappropriate to review history "* * * long in time and complicated in nature" (J.S. App. 55), at the behest of citizens who, so far as appears, have no particular connection with the title dispute. The Committee does not claim to represent the interest of any stockholders. But even such persons have standing only to raise issues affecting their financial interests as stockholders *per se. Allegheny Corp.* v. *Breswick & Co.,* 353 U.S. 151, 174–175 (1957); *Pittsburgh & W. Va. Ry.* v. *United States,* 281 U.S. 479, 487–488 (1930). Finally, it is clear that the Committee cannot derive standing merely from its participation in the proceedings before the Commission. *Alexander Sprunt & Son* v. *United States,* 281 U.S. 249, 254–255 (1930); *Pittsburgh & W. Va., Ry., supra.*

CONCLUSION

The judgment of the district court should be affirmed, or in the alternative, the appeal should be dismissed.

Respectfully submitted.

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